STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 11, 2002
v	No. 225049 Kent Circuit Court
WILLIAM JERMICHAEL CARTER, Defendant-Appellant.	LC No. 99-004389-FC

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of second-degree murder, MCL 750.317, and driving without a license, MCL 257.904. The trial court sentenced him to twenty-four to forty-five years' imprisonment for the murder conviction and to time served on the driving without a license conviction. We affirm.

Defendant first argues that the trial court erred by failing to conduct a more thorough investigation after two jurors expressed concern during trial that persons might have followed them from the courtroom. Defendant did not object to the procedure the trial court used in investigating the concerns, and he has therefore forfeited the issue. To obtain relief on a forfeited issue, a defendant "must show a plain error that affected substantial rights," and reversal is appropriate "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Here, no such showing can be made. The court inquired whether the impartiality of the jurors was negatively affected (the jurors denied any such effect), took steps to ensure that the jurors would feel secure from that point forward, and instructed the jurors that it did not appear that defendant had anything to do with the incident. Moreover, defendant merely speculates in arguing on appeal that the unidentified "followers," described only as sitting "on that side of the courtroom," were associated in the jurors' minds with him and that the jurors inevitably would have had their impartiality negatively impacted by the event. Because this issue was forfeited, and neither plain error, actual innocence, nor a serious, negative impact on the integrity of the proceedings can be shown, we find no basis for appellate relief.

Next, defendant argues that his constitutional right to counsel was violated by testimony that he consulted an attorney before deciding not to participate in a lineup.[1] First, we note that defendant forfeited this issue as well, objecting to the testimony at trial not on constitutional right-to-counsel grounds but only on relevancy grounds. Objection on one basis does not preserve a claim of error with respect to a different basis. *People v Stimage,* 202 Mich App 28, 30; 507 NW2d 778 (1993). Defendant has shown no plain error warranting reversal. See *Carines, supra* at 774.

Indeed, defendant admits that there is no constitutional right to forgo participation in a lineup. See *People v Gunter,* 14 Mich App 758, 759; 166 NW2d 33 (1968). While a defendant's constitutional rights may be violated if evidence is offered that he consulted a lawyer before exercising his constitutional right to remain silent, the constitutional right protected by this rule is the right to remain silent, not the right to counsel. Here, given that there is no constitutional right to forgo participation in a lineup, we conclude that evidence that defendant consulted with an attorney before declining the lineup did not give rise to an impermissible inference, because a negative inference drawn from the refusal to participate, whether at the suggestion of an attorney or on one's own motion, is permissible. See generally *People v Benson,* 180 Mich App 433, 437-439; 447 NW2d 755 (1989), reversed in part on other grounds 434 Mich 903 (1990). In addition, we note that, contrary to defendant's argument, the prosecutor in fact did not refer to defendant's consultation with counsel in closing argument.

Carines defines "plain error" as a "clear" or "obvious" error. *Carines, supra* at 763. Given the lack of authority supporting defendant's appellate argument, no clear or obvious error occurred. Nor, in our opinion, did the brief testimony regarding defendant's consultation with his attorney affect the outcome of the case. *Carines, supra* at 763.

Next, defendant argues that the prosecutor committed error requiring reversal by saying "bye" and "good-bye" to a witness after the witness failed to identify defendant as the driver of the vehicle that hit the victim. Defendant contends that in doing this, the prosecutor was attempting to frighten the witness into believing that he might be facing a prison term for perjury. "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Minor,* 213 Mich App 682, 689, 690; 541 NW2d 576 (1995). "Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Noble,* 238 Mich App 647, 660; 608 NW2d 123 (1999).

Here, defendant promptly objected to the prosecutor's comments, the objection was sustained, and the prosecutor was admonished, in the hearing of the jury, not to make such remarks. Moreover, if the purpose of the prosecutor's comments was to frighten the witness into changing his testimony, he was unsuccessful: the witness maintained in his testimony that defendant had not been driving the vehicle in question. Therefore, if the incident had any effect, it could only have been to defendant's advantage. The prosecutor's comments did not deny

[1] Defendant does not object to the testimony about his nonparticipation in the lineup per se but instead objects to the jury hearing that he *consulted with an attorney* before deciding to forego the lineup.

defendant a fair trial or affect the outcome of the case. *Minor, supra* at 689. Nor, contrary to defendant's implication, do we find that any other intimidation requiring reversal occurred in this case. As noted in *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999), affirmed 464 Mich 756 (2001), a witness properly may be informed that false testimony can result in a perjury charge.

Next, defendant argues that the trial court erred by allowing a physician, certified as an expert witness, to testify regarding the likely direction in which one of the occupants of the vehicle would have moved upon impact, when the proper subject of the doctor's testimony was the consistency of this occupant's injuries with his reported position in the vehicle. We review a trial court's decision regarding expert testimony for an abuse of discretion. See generally *People v Whitfield*, 425 Mich 116, 122; 388 NW2d 206 (1986). If an error did in fact occur, reversal is nonetheless not warranted unless "it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

We find no basis for reversal. Indeed, the jury was informed that in making a statement about the direction the occupant in question would have moved on impact, the witness was not in fact giving expert testimony but was instead rendering opinion as permitted under MRE 701. When asked further questions about additional occupants' movements, the witness properly declined to answer, stating "I'm not qualified to speculate on that." Under these circumstances, no abuse of discretion occurred. See *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996) (an abuse of discretion exists if "an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling"). Nor, in light of the other evidence introduced at trial, is it more likely than not that the challenged testimony affected the outcome of the case. *Lukity, supra* at 495.

Next, defendant argues that he was denied a fair trial due to pretrial publicity. Defendant, however, forfeited this issue by accepting the jury panel without exhausting his peremptory challenges and not renewing his motion for a change of venue at that point. See *People v Clark*, 243 Mich App 424, 426; 622 NW2d 344 (2000).[2] The situation is distinguishable from that in *People v DeLisle*, 202 Mich App 658; 509 NW2d 176 (1995); there, the defendant specifically noted that he was accepting the jury panel without exhausting his peremptory challenges for strategic reasons only, knowing that the trial court had rejected his motion for change of venue and specifically stating that he was not waiving the change of venue issue. *Id.* at 667 n 4. Here, defendant did not reserve the issue. Being forfeited, this issue warrants reversal only if "the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines, supra* at 774. Given the meticulous steps taken by the trial court to screen out potentially biased jurors without tainting the remaining jurors, and given the evidence from the screening process that the effects of the publicity were not as great

[2] While defendant in the instant case did not explicitly express satisfaction with the jury, he implicitly did so by failing to exhaust his peremptory challenges and by failing to renew his change of venue motion.

as might initially have been supposed, this standard was not met. The jurors evidenced no bias. See *People v Grove*, 455 Mich 439, 476-477; 566 NW2d 547 (1997). Reversal is unwarranted.[3]

Finally, defendant claims that his sentence was disproportionate. The sentence was, however, within the guidelines. Because the charged offense occurred on February 26, 1999, sentencing is controlled by the statutory guidelines. MCL 769.34(1). MCL 769.34(10) states that this Court does not have discretion to vacate a sentence within the guidelines unless the trial court erred in scoring the guidelines or relied upon inaccurate information in determining the sentence. A party may not contend on appeal that there was an error in scoring the guidelines or that inaccurate information was relied on unless that party raised the issue either "at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." *Id*. Defendant has not followed these procedures and does not currently argue that the guidelines were wrongly scored or that the sentence was based on inaccurate information; thus, we will not consider any challenge to the sentence. See *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000).

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter

[3] Even if the issue had not been forfeited, we would find no basis for reversal, because the record fails to establish such pervasive prejudice that the jury could not render a fair verdict.